Nos. 82-1771, 82-963 and 82-1711

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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, *Petitioner*,

vs.

ALBERTO ANTONIO LEON, et al.

COMMONWEALTH OF MASSACHUSETTS, *Petitioner*,

vs.

OSBORNE SHEPPARD.

STATE OF COLORADO, *Petitioner*,

vs.

FIDEL QUINTERO.

On Writs Of Certiorari To The United States Court Of Appeals
For The Ninth Circuit,
The Supreme Judicial Court Of Massachusetts,
And The Supreme Court Of Colorado

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, STATE PUBLIC DEFENDER OF CALIFORNIA

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QUESTIONS PRESENTED

1. In No. 82-1771, the question presented is whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reliance on a search warrant subsequently held to be defective for lack of probable cause.

2. In No. 82-963, the question presented is whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reliance on a search warrant supported by probable cause but defective for failure to specify the items to be seized.

3. In No. 82-1711, the question presented is whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in the erroneous belief that the warrantless arrest of a burglary suspect was made on probable cause.

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, STATE PUBLIC DEFENDER OF CALIFORNIA Amici Curiae In Support Of Respondents

INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers was founded 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, to promote the proper administration of criminal justice and to encourage the integrity, independence and expertise of the defense lawyer. It has more than 3,000 members.

California Attorneys for Criminal Justice is an organization of over 1,800 California lawyers engaging in the defense of criminal cases. It has an active educational program for the defense bar. It has a heightened interest in the federal interpretation of the Fourth Amendment with the recent passage of a California constitutional amendment possibly limiting the use of the California Constitution as an independent ground for the exclusion of illegally seized evidence in California courts.

The State Public Defender of California has the major responsibility for representation of indigent criminal defendants on appeal in that state. The office also provides advice and research materials to county public defenders and private attorneys engaged in criminal appellate practice in California.

The parties have given their consent to the filing of this *amici curiae* brief; the letters of consent are on file.

Amici are criminal defense lawyers who spend the major portions of their professional lives defending persons accused of crimes. We rise to the defense of the exclusionary rule of the Fourth Amendment because it demonstrates and makes effective the principle that no one in these United States is above the law. Judicial approval of the lawless enforcement of law would undercut that principle.

SUMMARY OF ARGUMENT

This brief follows four main arguments in urging that a "reasonable mistake" exception to the exclusionary rule

of the Fourth Amendment not be adopted by this Court for warrantless searches or for searches seemingly authorized by judicial warrant.

1. The price for application of the exclusionary rule is not too dear because the rule works to encourage the best in our police and magistrates at a relatively modest cost, considering the interests at stake. A cost-benefit analysis in this field is inappropriate, inexact and insufficient to justify the untoward results which would follow adoption of a major exception to the exclusionary rule. The available empirical data indicates that the exclusionary rule does effectively deter unlawful conduct and is responsible for fewer acquittals, especially when the defendant is charged with a violent crime, than is generally supposed.

2. In addition to the deterrence of unlawful conduct by the police, the current exclusionary rule encourages careful police work and careful decisions by magistrates, upholds the principle that significant government misconduct is a sufficient reason for dismissal of criminal proceedings transcending the question of the guilt or innocence of an individual defendant, is necessary if constitutional rights are to be perceived by the public as a reality and not hypocrisy, and refuses to allow the courts to commit an affront to the Constitution by allowing illegal actions to improve the government's power.

3. The proposed exception would increase the scope and number of *unconstitutional* searches of private persons, places and effects by rewarding rubber stamp magistrates and rewarding police resort to such magistrates. The proposed exception would also create a standardless, complex, two-step analysis for most Fourth Amendment issues which would be difficult to mold by precedent in the usual common law manner. Lastly, it appears that the exception, if adopted, would freeze current Fourth Amendment law in place as there would be no incentive for a defendant to challenge any police action which could be "reasonable" even if in violation of constitutional rights.

4. Application of the proposed exception to validate invalid warrants flies in the face of the wording of the Fourth Amendment, could allow general warrants and is unnecessary in view of the presumption given to the validity of warrants under current law.

ARGUMENT

I

THE EXCLUSIONARY RULE ENCOURAGES LAWFUL POLICE CONDUCT

A. Cost-Benefit Analysis Is Not an Appropriate Tool to Limit Constitutional Freedoms

As the cornerstone of his argument that a "reasonable mistake" exception should be adopted by this Court, the Solicitor General relies on the premise that the exclusionary rules comes up short after a cost-benefit analysis. (Brief for the United States, pp. 34-77). *Amici* believe that to the extent such an analysis is possible it demonstrates that the benefits of deterring violations of citizens' Fourth Amendment rights clearly outweigh the demonstrable "costs" of enforcing the rule. However, before that analysis is undertaken we respectfully suggest that this Court consider whether a cost-benefit analysis is the appropriate tool for analyzing policy decisions which affect our fundamental freedoms. At least one commentator, Professor Steven Kelman, has argued that it is not. He points out that, "We do not do cost-benefit analyses of freedom of speech or trial by jury."[1]

A cost-benefit analysis is inappropriate to those values embedded in our Bill of Rights precisely because they are "priceless" and have a moral force that transcends economic considerations. But putting any philosophical objections aside, there are difficult practical problems to applying a cost-benefit analysis to the Fourth Amendment's exclusionary rule. A cost-benefit analysis requires that the

[1]Kelman, *Cost-Benefit Analysis: An Ethical Critique*, Regulations, (American Enterprise Journal on Government and Society) 33, 35-36 (Jan./Feb., 1981).

benefits (in this case the deterrence of unlawful searches) and the costs (a guilty criminal defendant having an increased chance of going free) be assigned some relative "monetary" value.[2] Does an unlawful search outweigh a fortuitously freed but guilty defendant, or vice versa? If one outweighs the other then by what factor—a factor of two or a factor of ten? Does it depend on the seriousness of the unlawful search, or the crime which the defendant was charged with, or some other factors? These are hard questions, none of which are addressed in the Solicitor General's brief.

What surely must be conceded by the Solicitor General is that the precise number of unlawful searches deterred, and the precise number of criminal defendants who have been, or will be set free by the exclusionary rule is unknown and unknowable. To further complicate matters, there is no way of calculating how many of the cases not resulting in convictions solely because of search problems would be affected by the proposed "reasonable mistake" exception. Nor can one determine to what extent such an exception would affect the number of illegal searches presently deterred. Thus even if this Court could overcome the difficult task of assigning a relative value to the perceived costs and benefits of the exclusionary rule it is impossible to supply the multiplying factor necessary to complete the equation. As a result the Solicitor General's conclusion that the costs of the exclusionary rule in "reasonable mistake" situations outweigh the benefits, rather than being a scientific calculation, is no more than a subjective judgment.

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[2]Sugden and Williams, *The Principles of Practical Cost-Benefit Analysis*, Oxford University Press (1978). Of course, deterrence is not the only benefit of the exclusionary rule. See *infra*, Part II. Nor do all defendants who are in fact guilty of the crimes charged go free after the exclusionary rule results in the suppression of some of the evidence against them. Some are convicted on the remaining evidence. See note 29, *infra*.

B. Common Sense Tells Us That the Exclusionary Rule Encourages Compliance With the Fourth Amendment

It has been argued that at present the primary justification for the exclusionary rule is that it deters the police from violating the Fourth Amendment rights of our citizens to be free from unreasonable searches and seizures. Expanding on this thesis, critics of the exclusionary rule assert that since empirical data fails to conclusively establish a deterrent effect, the major justification for the exclusionary rule has disappeared.[3] *Amici* emphatically disagree and assert our position that common sense demonstrates that the exclusionary rule *does deter* unlawful police conduct and that no reliable empirical data has ever been developed to refute this Court's continued reliance on the deterrent assumption.[4] Conversely, empirical data does establish that the exclusionary rule has a negligible impact in freeing persons charged with crimes.[5]

Upon adopting the exclusionary rule in California, Chief Justice Traynor stated the deterrence rationale clearly and succinctly:

> Granted that the adoption of the exclusionary rule will not prevent all illegal searches and seizures, *it will discourage them.* Police officers and prosecuting officials are primarily interested in convicting crimi-

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[3]Brief for the United States (pp. 40-77). See Burger, C.J., dissenting in *Bivens v. Six Unknown Agents*, 403 U.S. 388, 416 (1971), also relying on Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.Chi. L.Rev. 665, 671 (1970).

[4]Historically the exclusionary rule evolved as a personal constitutional right, rooted in this Court's concern for judicial integrity and the right of privacy. *Boyd v. United States*, 116 U.S. 616, 653 (1886); *Weeks v. United States*, 232 U.S. 383, 392; *Elkins v. United States*, 364 U.S. 206, 223 (1960); *Mapp v. Ohio*, 367 U.S. 543, 655-656, 658-659 (1961). See Part II of this brief, *infra*.

[5]*Canon, Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 So.Tex. L.J. 558, 577 (1982) [hereinafter cited as Canon, *Ideology and Reality*].

> nals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives. (*People v. Cahan*, 44 Cal.2d 434, 448 (1955); emphasis added.)

Nobody has ever argued that either the exclusionary rule, or any other inducement, could ever compel 100% compliance with the Fourth Amendment by all magistrates, prosecutors and policemen at all times and all places in this country.[6] Degrees of compliance with constitutional requirements will necessarily vary from state to state, from city to city, from police force to police force, and among individual officers on any force.[7] Nonetheless, what the exclusionary rule has done is simplicity itself. Violation of the Fourth Amendment is discouraged. Compliance with the Fourth Amendment is encouraged.[8]

Critics of the exclusionary rule must necessarily take an extraordinarily cynical, albeit unstated, view of this nation's police officers. At the core of this criticism is the assumption that policemen are concerned solely with "ar-

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[6]Professor Amsterdam characterizes the rule as providing "a counterweight within the criminal justice system that prevents the system from functioning as an unmitigated inducement to policemen to violate the Fourth Amendment on every occasion when there is criminal evidence to be gained by doing so." (Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L.Rev. 349, 431 (1974) [hereinafter cited as Amsterdam].)

[7]Amsterdam, at 431-432.

[8]Theoretically the case for the exclusionary rule's ability to encourage positive and discourage negative behavior would seem to be at least as strong as the case for the death penalty's deterrent effect. Critics of the exclusionary rule, who support the death penalty, have trouble with this dilemma (see Wright, *Must the Criminal Go Free If the Constable Blunders*, 50 Tex. L.Rev. 736, at 739-740). Indeed, in view of the high crime rate in general it could be argued that our entire criminal justice system is having little deterrent effect. (Canon, *Ideology and Reality*, at 564).

rests" and not "convictions," and that therefore exclusion or illegally obtained evidence in the courtroom will not affect their behavior on the "streets." A necessary corollary to that argument, in the warrant context, is that the magistrate who issues a warrant with insufficient probable cause is also indifferent to the ultimate disposition of the case and therefore cannot be encouraged to act within constitutional guidelines.

Again, common sense should intervene. There is no reason to suppose that police officers view their jobs from such a narrow perspective. On the contrary, both logic and experience suggest that the police are very concerned that criminals be arrested *and* convicted. It is, after all, their sworn duty to gather evidence for that purpose. It is certainly not unreasonable to assume that the police, to that practical end, have been encouraged by the exclusionary rule to comply with the Fourth Amendment. Clearly, no convincing empirical data has been developed to undermine that assumption.[9]

C. Empirical Data on the Effect of the Exclusionary Rule Is Consistent With the Assumption That the Rule Encourages Compliance With Constitutional Standards

The Solicitor General in criticizing the exclusionary rule can hardly be encouraged by the fact that the principal study purporting to show by empirical data that the rule does not deter was published 13 years ago, or that it relied on statistical data now essentially 16 to 25 years out of date.[10] The thrust of Dalin Oaks' research was to

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[9]Failing to cite data to support his position, the Solicitor General has instead attempted to shift the burden of proof to those who support the *status quo*. (Brief for the United States, pp. 38-39). However, the Solicitor General in proposing a novel "reasonable mistake" exception to the exclusionary rule, a concept representing a sharp break with 70 years of precedent, must bear that burden.

[10]Back in 1974, Dr. Bradley Canon was already referring to the Oaks study as dated. (Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681, 699 (1974) [hereinafter cited as Canon, *Is the Exclusionary Rule in Failing Health*].)

study arrests for narcotics, weapons, gambling and stolen property in one city, Cincinnati, before and after this Court's *Mapp* decision. He reasoned that if the exclusionary rule was detering unlawful conduct, arrests for these crimes, which generally required evidence to be seized, would decline. Failing to clearly find such a decline, Oaks found the results "inconclusive."[11]

The most telling criticism of the Oaks research is the extremely limited nature of his sample. Assuming he had established that the Cincinnati police were not, immediately after *Mapp*, being deterred from conducting unlawful searches, that would tell us very little about the overall effect of the exclusionary rule. The reaction of the Cincinnati police might have nothing in common with the reaction of the police forces in, for example, Boston, Buffalo, New York, or Baltimore. In fact other studies demonstrate that there was a dramatic decrease in arrests following *Mapp* in Baltimore and Buffalo.[12] In addition, this dated material tells us nothing about how the police, even in Cincinnati, have responded to the exclusionary rule during the last decade.

The only other empirical study that is generally relied on by critics of the exclusionary rule is the work of Oaks "successor," James Spiotto.[13] Spiotto's study was also confined to one city, Chicago, and likewise relies on statistical information that is now over ten years out of date.

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[11]In spite of the "inconclusive" nature of the data, Oaks stated his "personal opinion" against the rule, an opinion he specifically divorced from his research. (Oaks, at 755.) The Solicitor General has relied heavily on that "personal opinion" in attacking the exclusionary rule. (Brief of the United States, p. 41.)

[12]Canon, *Is the Exclusionary Rule in Failing Health*, at 698-699, 706.

[13]Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Studies 243 (1973) [hereinafter cited as Spiotto].

It is thus subject to the same criticism as that of Oaks and also subject to a number of new ones.[14]

The most recent, and extensive empirical studies on the effect of the exclusionary rule have been undertaken by Bradley Canon.[15]

It should be noted that in the process of conducting a cost-benefit analysis of the exclusionary rule the Solicitor General does not mention any of Canon's studies. Unlike Oaks and Spiotto, the research was not confined to one city. The arrest statistics for "search and seizure" sensitive crimes were examined in nineteen cities. In approximately half of those cities there was a dramatic decrease in the number of arrests following *Mapp*, and in the other one-half the effect seemed to be minimum or absent.[16]

Canon also inquired into the issuance of search warrants in several cities before and after *Mapp*. He reasoned that an increase in applications for search warrants would demonstrate that less illegal searches were being conducted and that police forces in general were attempting to comply with the Fourth Amendment. He discovered that prior to *Mapp*, the use of search warrants in most cities was virtually non-existent. Conversely, subsequent to this Court's decision, a substantial number of warrants were obtained.[17]

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[14]For a detailed criticism of Spiotto's work see Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 N.W.U. L.Rev. 740 (1974) [hereinafter cited as Critique].

[15]See Canon, *Ideology and Reality;* Canon, *Is the Exclusionary Rule in Failing Health;* Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Level: The Case of the Exclusionary Rule*, 15 Am.Pol.Q. 57 (1977) [hereinafter cited as Canon, *Testing the Effectiveness*]; Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?* 62 Judicature 398 (1979) [hereinafter cited as Canon, *The Exclusionary Rule*].

[16]Canon, *The Exclusionary Rule*, at 400.

[17]Canon, *Ideology and Reality*, at 589, citing the work of Michael Bane.

In addition, Canon's survey of law enforcement leaders demonstrated a wide-spread adoption, by police departments, of policies to implement this Supreme Court's *Mapp* and other search and seizure decisions.[18]

Canon concluded that "—the exclusionary rule can and does have a very real, although hardly universal, deterrent effect on the police.[19] Thus, while overall the empirical data may be characterized as "inconclusive," it is, in fact, quite consistent with this Court's continuing assumption that the exclusionary rule does encourage the police to conduct searches that comport with the Fourth Amendment.[20]

D. The Exclusionary Rule Is Seldom Implicated in the Release of Persons Charged With Crimes, Particularly Crimes of Violence

Popular rhetoric has placed upon the exclusionary rule the blame for many of the perceived ills of the criminal justice system.[21] The principal charge against the rule is that it is responsible for substantial numbers of guilty criminal defendants being set free. The Solicitor General argues, therefore, that the "cost" of the rule outweighs the benefit of deterring unlawful police conduct.[22] Recent empirical evidence shows that these charges are unfounded. At every level of the criminal justice system the effect of the exclusionary rule, particularly on "violent" crime, is remarkably modest.

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[18]Canon, *Ideology and Reality*, at 569, citing the research of Professor Stephen Wasby.

[19]Canon, *The Exclusionary Rule*, at 400.

[20]*Stone v. Powell*, 428 U.S. 465, 492-493 (1976).

[21]See in particular Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 Judicature 214 (1978) [hereinafter, Wilkey, *The Exclusionary Rule*].

[22]Brief for the United States, pp. 38-77. See also Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 So.Tex.L.J. 590, 536 (1982).

1. Relatively Few Criminal Defendants Go Free Because of the Exclusionary Rule

In the first instance several studies have demonstrated that a very low percentage of overall complaints are rejected by prosecutors because of search and seizure problems.[23] A 1978 report by the independent General Accounting Office reported on the impact of the exclusionary rule in federal criminal prosecutions. It was revealed that the federal prosecutors dropped charges because of search and seizure problems in only .2% of all cases presented for prosecution.[24] Data developed in a recent study by the Department of Justice is consistent with the GAO report. That study considered the effect of the exclusionary rule in state criminal prosecutions in California.[25]

The study shows that over a three-year period, statewide, of all cases rejected for prosecution, 4.8% were rejected for search and seizure reasons. However, as only 17% of all cases presented were rejected this means that a mere .8% of the total number of felony cases were rejected for search and seizure reasons. (Dep't of Justice Study, p. 10).[26] Therefore, as in the GAO report, less than 1% of all criminal complaints were dismissed by the prosecution for search and seizure reasons.

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[23]Canon, *Ideology and Reality*, at 573-576, and studies cited.

[24]Report by the Comptroller General of the United States (GAO): *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* (1979) [hereinafter cited as GAO Report]. The report showed that .4% of all cases rejected by the federal prosecutors were for search and seizure reasons. Since approximately 50% of all cases were rejected this means that search and seizure problems were implicated in rejecting only .2% of the total cases. (*Id.*, at 13-14.)

[25]*The Effect of the Exclusionary Rule: A Study in California*, Criminal Justice Research Report (1982) [hereinafter Department of Justice Study].

[26]Fyfe, *Enforcement Workshop, The NIJ Study of the Exclusionary Rule*, 19 Crim. L.Bull. 253, 257, n. 15 (1983) [hereinafter Fyfe].

These, and other studies[27] also show that less than 10% of the motions to suppress are granted and that even when granted the defendant will, in many cases still be convicted.[28] Studies of the California appellate system reveal that the appellate courts are as likely to reverse a *granting* of a motion to suppress as they are to reverse a denial.[29]

2. The Exclusionary Rule Has Virtually No Effect on the Successful Prosecution of Violent Crimes

It is clear that any impact of the exclusionary rule is felt almost exclusively in the area of drug offenses and other non-violent crimes. The principal empirical researchers, Oaks, Spiotto, and Canon have all recognized that the rule's effect is limited to victimless crimes and has only a tiny effect on the prosecution of violent crimes.[30]

Both the Institute For Law and Social Research (INSLAW) Study in Washington, D.C. and the Department of Justice study in California find that over 70% of the cases dropped were drug cases.[31] In evaluating that 70% figure it should be kept in mind that while most cases

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[27]Canon, *Ideology and Reality*, at 574-575, Canon,, *Is the Exclusionary Rule in Failing Health*, at 721-722. See also Fyfe at p. 257. From 1976 to 1979 only .4% of the 150,000 felony cases processed in California Superior Courts resulted in dismissals because of search and seizure problems.

[28]Over half of the defendants whose search and seizure motions were granted in federal court were still convicted. (GAO Study, p. 13.)

[29]Davies, *Do Criminal Due Process Principles Make A Difference?*, Am.Bar Foundation Res. J. 247, 266-267. See also Annual Report, Judicial Counsel of California (1983) pp. 11-12, which showed that errors in motions to suppress evidence constituted only 5.1% of the reversals in the Court of Appeal. Since 12.5% of the total criminal cases resulted in reversals that means that reversals due to the granting or denying of motions to suppress constituted only .6% of all criminal cases decided.

[30]Dep't of Justice Study, p. 12; GAO Report, p. 7; Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L.Rev. 1027 (1974); Wright, at 741; Critique, at 774.

[31]Canon, *Ideology and Reality*, at 576.

rejected for search and seizure reasons are drug cases, the overwhelming percentage of drug cases do *not* encounter any such problem and are successfully prosecuted. This is confirmed by statistics in California compiled by Thomas Y. Davies, which showed that in 1980, statewide, prosecutors rejected 938 drug cases out of 40,451 narcotics arrests for a total of 2.3%. (See Canon, *Ideology and Reality*, p. 574, citing Davies.)

However, the Solicitor General has seriously misrepresented the statistics in the Department of Justice study to claim that prosecutors rejected 30% of all felony drug cases because of search and seizure problems. This misrepresentation was first detected in the *amicus* brief (at p. 49) of the Solicitor General in *Illinois v. Gates*, U.S. , 76 L.Ed.2d 527 (1983). Unfortunately that 30% figure was used by Justice White in a footnote in a concurring opinion in *Gates, id.*, at 561, n. 13. That footnote has now been elevated to the text as a centerpiece of the Solicitor General's brief in this case on the question of the "cost" of the exclusionary rule. (Brief for the United States, p. 70).

For the record, that 30% figure, as explained in the Department of Justice study, is solely for drug cases rejected in two of the 21 prosecutorial offices in Los Angeles County. This aberrant figure has no apparent statistical relevancy. The statewide figure is *not* 30% it is 2.3%, as explained above. This distortion by a factor of approximately thirteen of the "cost" of the exclusionary rule in drug cases obviously has a profound effect on any realistic cost-benefit analysis.

In any event, while the exclusionary rule has little real effect on the prosecution of most drug cases it clearly plays almost no role in the prosecution of crimes of violence.

The INSLAW study showed that of the over 5,000 persons charged with a violent crime *not one* was dropped by the prosecution because of search and seizure problems.[32]

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[32]Canon, *Ideology and Reality*, at 576.

The Department of Justice study showed that out of over 530,000 felony cases processed in a four-year period in California only four involved murder cases with search and seizure problems.[33] The modest effect of the exclusionary rule on the criminal justice system is almost exclusively in the area of non-violent crimes. The critics of the rule have, in the words of one commentator, exaggerated the costs a "hundredfold or more."[34]

Again one must consider the effect of such an exaggeration on a serious cost-benefit analysis. If the costs of the exclusionary rule are only 1% of what some critics have contended, the case for a "reasonable mistake" modification collapses.

E. This Court's Assumption That the Exclusionary Rule Encourages Compliance With the Fourth Amendment Is Well Founded

In 1976, a majority of this Court, speaking through Justice Powell, strongly reaffirmed its belief in the exclusionary rule.

> Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease.

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[33]The Department of Justice study did attempt to demonstrate that defendants not prosecuted in San Diego County, because of search and seizure problems, were "career criminals." (*Id.* at pp. 13-18; Brief for the United States, p. 71, n. 36.) However, the data offered in this regard is clearly suspect. In the first instance there is no "base-line" figure to show the overall arrest record for persons arrested on felony charges. Thus, there is no basis for comparison to show that the non-prosecuted persons are particularly arrest-prone. In addition, the study admittedly uses arrest rather than conviction figures. These figures might simply demonstrate something this Court is now familiar with: the propensity of the San Diego police to arrest the same person time and again. See *e.g., Kolender v. Lawson*, ... U.S. ..., 75 L.Ed.2d 903, 908, n. 3 (1983) where Mr. Lawson was detained 15 times in 22 months by the San Diego Police. See also Fyfe at pp. 258-260.

[34]Canon, *Ideology and Reality*, at 577.

> Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.
>
> We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions. (Fns. omitted; *Stone v. Powell, supra,* at 492-493.)

It is noteworthy that this Court's continued reliance on the efficacy of the exclusionary rule was reached "[d]espite the absence of supportive empirical evidence," and with the specific recognition of the studies of Oaks, Spiotto and Canon. (*Id.,* n. 34.) Certainly nothing in the way of empirical evidence has appeared since that decision which would support a reconsideration of that affirmation.

II

NO MAJOR EXCEPTION TO THE EXCLUSIONARY RULE SHOULD BE ADOPTED WITHOUT CONSIDERING ALL THE VALUES THE RULE PROTECTS

The proponents of a "reasonable mistake" exception to the exclusionary rule rest their case on a perceived absence of a deterrent effect on unlawful police conduct from the application of that rule in "reasonable mistake" situations. To the extent that other foundations can be found for the exclusionary rule in "reasonable mistake" situations, the argument of the "reasonable mistake" proponents is undercut. While the presence of other supports for the exclusionary rule may not have been sufficient to

require the rule's application in situations peripheral to the guilt-innocence issue in criminal law,[35] *amici* believe that the following direct benefits of the exclusionary rule, only briefly discussed here, must be given great weight when a major exception to the enforcement of the Fourth Amendment, going to the heart of what evidence will be presented on the issue of guilt or innocence in criminal cases, is being considered.

Before we discuss those additional foundations for the exclusionary rule some attention must be given to the plea that the exclusionary rule should be looked on with disfavor because it can suppress at trial "the very evidence that is most relevant and trustworthy" and "subverts the court's paramount truthfinding function." (Brief for the United States, pp. 68-69.) Long ago our system of values dictated that there were goals greater than detection and punishment of those guilty of a specific crime. Where the only evidence against a murder suspect is the body of his victim found as the result of torture of the suspect, our values demand that the murderer go free[36] despite the uncontrovertible evidence against him. *Blackburn v. Alabama* (1960) 361 U.S. 199; *Rogers v. Richmond* (1961) 365 U.S. 534. In the same situation, where the only evidence against the accused is obtained after denial of his right to counsel, its truthfulness is irrelevant and he cannot be convicted. *Escobedo v. Illinois* (1964) 378 U.S. 478. The values of the Fourth Amendment—security, privacy, dignity of the individual, judicial scrutiny of the actions of the executive's satraps—are worthy of the highest protection and cannot be submerged in the expediency of the criminal process.

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[35] *United States v. Calandra* (1974) 414 U.S. 338 (grand jury proceedings); *United States v. Havens* (1980) 446 U.S. 620 (impeachment of testifying witness); *Stone v. Powell* (1976) 428 U.S. 465 (collateral attack).

[36] No one seems to argue, in these times, that we punish the torturer for his "blunder" and use the evidence against the murderer.

1. Retired Associate Justice Potter Stewart has recently characterized with great insight his concern with a "reasonable mistake" exception as a shift in focus from "what does the Fourth Amendment require?" to "what will the courts allow me to get away with?" (Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 Col. L.Rev. 1365, 1403 (1983).) He believes that adopting the exception would have a "profound symbolic effect" on the perception by both the police and the public of this Court's commitment to enforcement of the Fourth Amendment. (*Ibid.*, p. 1400.) The first and perhaps most important foundation of the rights of security and privacy in this country is the belief that these rights will be given life, will be respected and will be enforced by the courts. The *reality* of security and privacy is verified by an effective exclusionary rule after the government trespasses from whatever motive. A retreat to a "what can we 'get away with'" philosophy removes that foundation.

2. As pointed out by this Court in 1914 when it held that the Fourth Amendment included an exclusionary rule in *Weeks v. United States*, 232 U.S. 383, 392-394, every time the courts allow a violation of a defendant's Fourth Amendment rights to contribute to his conviction the courts approve an incursion into territory forbidden by the constitution and left by that document to the guardianship of the courts.[37] The policeman, operating directly

[37]This "judicial integrity" rationale was also used by the court in *Mapp v. Ohio*, 367 U.S. 643, 648 (1961); see also Justice Holmes, dissenting in *Olmstead v. United States*, 227 U.S. 438, 470(1928); *Terry v. Ohio* (1968) 392 U.S. 1, 13 ["A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence. . . ."]. The judicial integrity rationale was adhered to by at least eight Justices in *United States v. Payner* (1980) 447 U.S. 727, 735 (n. 8), 738 [". . . the Fourth Amendment exclusionary rule . . . is applied in part 'to protect the integrity of the court . . .' ".]

with the laws whose application belongs to the courts, is the agent of that system and his actions cannot be disowned by it. While a heavier condemnation is rightly directed at those officers who intentionally flout the law in their zeal to enforce it, there is no doubt that every violation of the Fourth Amendment is unconstitutional and every conviction obtained by such means is an affront to the constitution; a "reasonable mistake" exception would encourage such affronts in close cases rather than encouraging the police to take all possible steps to protect constitutional rights.

III

THE PROPOSED REASONABLE MISTAKE EXCEPTION WOULD ENCOURAGE FOURTH AMENDMENT VIOLATIONS, BE DIFFICULT AND COMPLEX TO APPLY AND WOULD FREEZE DEVELOPMENT OF FOURTH AMENDMENT LAW

A. The Proposed "Reasonable Mistake" Exception Will Encourage Police to Obtain Warrants from Rubber Stamp Magistrates and Thus Increase the Number of Unlawful Searches Undertaken for Exploratory Purposes on Less Than Probable Cause

The proposed exception to the exclusionary rule would encourage police officers to resort to "rubber stamp" magistrates more than they do at present and thus increase the number of open-ended exploratory search warrants based on less than probable cause. Most such warrants would be excluded from review by the proposed exception and would increasingly become the rule, as the bad drives out the good in economics.

Zealous police officers, engaged in the often-competitive enterprise of ferreting out crime, are aware of the existence of rubber stamp magistrates—magistrates who through willfulness, ignorance or naivete will, whenever asked, sign a search warrant which is overbroad in its scope or which is not supported by the minimum facts

required under law to support a finding of probable cause. Studies have shown that police do shop around for a magistrate who is "lenient in issuing search warrants" and that there is "substantial disparity between magistrates as to how much evidence is required to obtain a search warrant." Tiffany, McIntyre & Rotenberg, *Detection of Crime*, 120, 204 (1967).

At present, conscientious officers are discouraged from resorting to rubber stamp magistrates because warrants issued by those magistrates are subject to review. Through pride in their work and the desire to obtain a good warrant whose fruits will be admissible most officers will not resort to rubber stamp magistrates but will instead endeavor to produce warrants and affidavits which will pass muster upon review—warrants and affidavits which will "stand up in court."

"Why bother?" will be the response of the police if this court adopts the proposed "reasonable mistake" exception for search warrants. Why bother to accumulate facts supporting probable cause for a search warrant? Why bother to draft a warrant particularly describing the place to be searched and the evidence to be sought? Why bother, in short, to comply with the requirements of the Fourth Amendment regarding warrants?

The former New York City Deputy Police Commissioner in charge of legal matters said in 1965:

> The *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled that evidence obtained without a warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?

N.Y. Times, April 28, 1965, at 50 col. 1, quoted in Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, De-*

velopment and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Columbia L. Rev. 1365, 1386 (1983). Under the proposed exception for warrants, the number of warrants sought and obtained would increase, as there would no longer be any reason for warrants to be more than a *pro forma compliance* with the requirements of the fourth amendment.[18] The consequent surrender of privacy rights—of the innocent and the guilty—would be enormous.

While at present law-abiding and conscientious police officers seek to obtain their warrants from those judges and magistrates who will not sign a questionable warrant and only officers whose sole concern is their arrest records seek out the rubber stamp magistrates and judges, the proposed exception will encourage all officers to seek out the rubber stamp magistrate since their jobs will be easier if they do. As a consequence, the search warrant issued on less than probable cause will become the rule, not the exception. The search warrant which does not particularly describe the place to be searched and the evidence to be sought will become the rule, not the exception. The standard will be lowered with each warrant, until the general warrant looms large in all but name.

The most well-intentioned, law-abiding and conscientious police officers will be encouraged, even driven, to take advantage of the new method of obtaining admissible evidence, as there can be no doubt that exploratory warrants can increase greatly the possibility of finding evidence in

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[18]The Solicitor General concedes that some warrants would be lacking in probable cause to such an egregious degree that the exclusionary rule should be utilized. Brief for the United States, p. 65. Two comments are in order: (1) What warrant could be worse (i.e. more clearly void on its face) than the one in *Sheppard,* which the Solicitor General argues should be approved? (2) Once probable cause is lacking, what possible "bright line" standard could be stated for lower courts to decide which warrants still did not authorize a legal search?

crime. An officer whose job is to seek admissible evidence of crime would be dubbed a fool if his scruples prevented him from using to advantage the premium put on the rubber stamp by the proposed exception. He could in fact be said to be derelict in his duty if he did not do so. The police are properly partisan, investigatory, and oriented toward discovering and convicting perpetrators of crime:

> [I]t is necessary to begin with the right question, which is whether admitting the evidence in such instances would create an additional incentive to infringe upon fourth amendment rights. I see no basis for assuming the answer to be other than yes.

La Fave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 Univ. Pittsburgh L. Rev. 307, 353 (1982).

There are judges who issue exploratory warrants on less than probable cause. Some "judges do misconstrue the Fourth Amendment and fudge the standards of probable cause, all in what they consider to be the overall good of justice and the community." Wilkey, *A Call for Alternatives to the Exclusionary Rule,* 62 Judicature 351, 356 (1979). There are at present inhibitions on doing so, and inhibitions on police officers seeking out such judges for search warrants that will not stand up in court. The vast majority of warrants are issued by the lowest courts; their orders are subject to review. The proposed "reasonable mistake" exception would remove those inhibitions and exempt from review these orders of the lowest courts affecting basic constitutional rights where they mean most to the citizens, in the privacy of their homes. The irony of exempting this power from review by higher courts is overwhelming.

Thus, there is at present an incentive for police to frame good warrants and to provide probable cause for warrants. There is an incentive for magistrates not to issue bad warrants, to correct mistakes. Under the proposed exception

> [T]here is no incentive—apart from a professional desire to comply with the fourth amendment—for that magistrate to refrain from repeating the same mistake in the future or from granting any colorable request for a search warrant.
>
> Stewart, *supra*, 83 Columbia L. Rev. at 1403.

B. The Proposed Exception Will Introduce a Two-Step Analysis Into Every Search and Seizure Hearing, Confuse the Area of Fourth Amendment Law With a Dual Test and Make It Difficult to Know What Standards to Apply in Assessing the Admissibility of Evidence Obtained in Violation of the Fourth Amendment

"Probable cause" is a phrase found in the Fourth Amendment. A long history of judicial interpretation has made it a standard widely understood and followed. It is a "reasonable man" standard which, though stated in the abstract and not without problems, has through countless cases over the years acquired a familiarity and simplicity making it an objective test susceptible of uniform application by police officers and courts alike.

To this it is proposed to add a second test, to introduce a two-step analysis into every search and seizure hearing, to apply a dual test to each police action cognizable under the Fourth Amendment. The number of motions made by defense attorneys will not diminish; however, the length of hearings will increase as each such motion will, under the dual test, require both a judgment as to probable cause and then a judgment under the unknown "reasonably well-trained officer" standard.

The latter standard has no history. It is not known how it differs, if it does, from the reasonable man standard. In effect, it will create two levels of probable cause to be tested in each search and seizure hearing: the reasonable man standard and the reasonably well-trained officer standard. While the trial courts are well capable of applying

the first standard and producing a general and uniform predictability of law, the same cannot be said of the second standard. If there is confusion as to what constitutes probable cause, the two-step analysis will confound the confusion.

The dual test will be required in every hearing on every motion. The trial court must engage in the two-step analysis because its rulings are subject to review, and the reviewing court must have the trial court's findings in order to review them.

Since the new test has no history, it can be expected to inject uncertainty and confusion into every hearing in the trial courts and into every review by the appellate courts. While there is general consistency and specific guidance in applying the probable cause standard, there can be no consistency, no guidance, in applying a reasonably well-trained officer standard.

The new dual test will erase all bright lines. If the new dual test is adopted, it will be "essential to have a Court opinion . . . that provides 'specific guidance to police and courts . . . '" *United States v. Ross,* 456 U.S. 798, 826 (Powell, J., concurring), but is that possible? Will there not be as many court opinions as there are courts, all differing and all confused in their understanding and interpretation of the new rule?

And to what end? The percentage of felony cases affected by the exclusionary rule is already minuscule. What minuscule part of that minuscule percent will be affected by a new rule which must cause confusion and uncertainty while greatly increasing the time and concentration which must be given to such cases by both trial and appellate courts?

The Court recently adopted a two-step analysis for assessing the application of the Fifth Amendment exclusionary rule in some cases. *Oregon v. Bradshaw,* U.S. ,

77 L.Ed. 2d 405, 103 S. Ct. 2830 (1983). The proposed "reasonable mistake" exception to the exclusionary rule would necessitate such a dual test in all Fourth Amendment cases. Of the test adopted in *Oregon v. Bradshaw, supra,* Justice Powell wrote, "My concern is that a two-step analysis could confound the confusion . . . " *Oregon v. Bradshaw, supra,* 77 L.Ed. 2d at 415, 103 S. Ct. at 2837. In that case, at least, both steps are within the purview of general judicial knowledge and experience. Here, the second step is a judicial "wild card" with no past and an uncertain future.

If the proposed exception were adopted some interesting and difficult issues of *stare decisis* would be created. For example, if the highest court of a state holds, as in *Quintero,* that an arrest took place without probable cause but the subsequent search does not result in the invocation of the exclusionary rule of the Fourth Amendment because there was a "reasonable mistake," would the same mistake be reasonable in a factual situation occurring after that decision became public? What if the police officer making the arrest knows of a similar factual situation where a *trial court* held a search illegal under the Fourth Amendment? Is his arrest still a "reasonable mistake" despite such knowledge? How is such knowledge proven? Or, perhaps, once a mistake has been found to be reasonable it will always be reasonable, in which case the Fourth Amendment is, in effect, amended by each reasonable mistake.

C. The "Reasonable Mistake" Exception Would Freeze Development of Fourth Amendment Law By Removing a Defendant's Incentive to Challenge Arguable Cases

Growth and development, a sure sign of life and health, would be denied the Fourth Amendment under a "reasonable mistake" exception. We illustrate this point by a discussion of the recent *Steagald v. United States* (1981) 451 U.S. 204. That case, over the dissents of two Justices, established an extremely important point: that in the

absence of exigent circumstances or consent the combination of an arrest warrant and probable cause that the subject of that warrant was present in a third party's home is not sufficient to allow police invasion of that home without the authorization of a search warrant issued by a neutral magistrate. When the police made the entry into Steagald's home to execute their arrest warrant they were not acting lawlessly or even in an area of uncertainty. Two years previous to the entry into Steagald's home, the Fifth Circuit had decided that an officer holding a valid arrest warrant who reasonably believes its subject is within a home belonging to a third party need not obtain a search warrant to enter that home to execute the warrant. *United States v. Cravero,* 545 F.2d 406, 421 (1976). That decision was the final authority on the subject in Atlanta, where the entry into Steagald's home was made. Obviously, the DEA officers who entered Steagald's home were in perfect good faith.

If the "reasonable mistake" exception now being proposed had been in effect at the time of the entry into Steagald's home, the legality of that entry would have been a moot point for Steagald. He would have no incentive to raise the issue since he would lose whether or not the entry had violated his rights to privacy and security under the Fourth Amendment. This Court would never have heard Steagald's case and the constitutional point might never have been decided. The warning of the majority of this Court that a rule allowing the police, acting alone, to decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant "would create a significant potential for abuse" (451 U.S. at 215) would never have been given. *Steagald* was the perfect case for the application of the "reasonable mistake" rule and is the perfect example of why it should not be applied or adopted.

IV

A WARRANT ISSUED ON A SHOWING WHICH DOES NOT AMOUNT TO PROBABLE CAUSE IS NOT A CONSTITUTIONAL WARRANT

A. The History of the Warrant Clause of the Fourth Amendment Cautions Against Adoption of Exceptions to the Probable Cause Requirement

It was not primarily police misconduct which inspired the adoption of the Fourth Amendment. The Fourth Amendment, and particularly the warrant clause, was an outgrowth of the issuance of general warrants and writs of assistance by colonial magistrates. The authors of the Bill of Rights were especially concerned about abusive searches performed with the aid and encouragement of judicial officers, because that was the infringement of rights they had experienced. They wanted to prevent, by constitutional guarantee, the kinds of systematic, court-sanctioned invasions of privacy which resulted from warrants which could issue without adequate probable cause for the search."

The lessons of this history should not be ignored. If America today does not suffer from the routine issuance of invalid general warrants, it is because the framers took care to protect us from that situation. Giving magistrates *carte blanche* to issue warrants, free from any review of higher courts except in the clearest of cases, would sanction by implication the very abuses the Fourth Amendment was adopted to prevent.

"Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 Journal of Criminal Law & Criminology 635, 636 (1978), fns. omitted. Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule In Search and Seizure Cases*, 83 Cal. L.Rev. 1365, 1372-1377 (1983); see generally the authorities cited in Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L.Rev. 349, 450-451, n. 168.

B. The Preference Given to Warrants Is a Sufficient "Reward" for the Good Faith of the Police in Seeking Judicial Authorization for Their Actions

The law *already* rewards the officer who seeks a warrant by making it less likely that the evidence he seizes pursuant to the warrant will be suppressed. This Court has directed that warrants be interpreted in a common sense manner and that "the resolution of doubtful or marginal cases [be] largely determined by the preference to be accorded to warrants." *(United States v. Ventresca,* 380 U.S. 102, 109 (1965),[40] citation omitted.) Thus, the police officer who desires a successful prosecution is duly rewarded for his good faith in seeking a warrant. His basis for the search is given that most valuable of considerations, the benefit of the doubt.

No *additional* advantage should be extended. If a warrant cannot meet this minimal standard of reasonableness even after all doubts are resolved in its favor, it should not be allowed to form the justification for a search. Every invalid warrant represents an unjustified invasion of an individual's privacy, and they are not so rare that the risk can be totally discounted, even with the exclusionary rule as a sanction.

Without the exclusionary rule as a sanction, the risk of invalid warrants would be much greater. In a nation with thousands of magistrates, some inevitably will know more about Fourth Amendment guarantees than others, and be more careful in the issuance of warrants. Careful magistrates, for example, often protect citizens' rights without stifling a criminal investigation by asking the

[40]When a search is based upon a magistrate's, rather than a police officer's, determination of probable cause reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present. . . ." (*Jones v. United States,* 362 U.S. 257, 271 (1960).)

police to do further investigation before they will issue a search warrant. As discussed in the previous section, in the absence of the exclusionary rule, police would be encouraged to seek magistrates who knew little or nothing about Fourth Amendment law, and would issue a warrant on little more than the fact one was sought by the police. Unless a warrant fell below the amorphous standard of "objective reasonableness," the citizens of the United States would have no real protection from unconstitutional searches authorized by such uninformed magistrates.

C. No Feasible Alternative to Exclusion Exists Where There Is a Warrant

Suggestions for an effective alternative remedy to the exclusionary rule are conspicuously weak in the briefing in these cases. Whatever the possibility of fashioning an alternative remedy for unlawful warrantless searches, there is little prospect at all of doing so for searches carried out pursuant to a warrant issued without probable cause. The magistrate who authorized the unlawful search would have acted in good faith, and would certainly enjoy judicial immunity from civil suit. So even if a fair special tribunal could be found to hear civil search cases, and the financially strapped federal and state governments could be expected to appropriate substantial sums to pay judgments for unlawful searches—two highly questionable assumptions—the person whose person, home, automobile or effects were unlawfully searched pursuant to an invalid warrant would have no redress from that tribunal.

A particular magistrate who repeatedly authorized outrageous searches might eventually be removed by the appointing power or defeated in an election, but only constant and extreme violations of the Fourth Amendment would be likely to be cause for removal from office.[41] Even

[41]It is the routine violations of the Fourth Amendment, rather than the exceptional incidents which generate public outcry, which most require the exclusionary sanction. Shocking or violent intru-

then, the crucial question would most likely be the political power of the targets of the outrageous searches, not the seriousness of the constitutional violations themselves.

CONCLUSION

No reevaluation of the exclusionary rule can properly ignore the history of the rule. Integral to that history is its place in protecting the rights of privacy of our citizens and vindicating their Fourth Amendment rights, as well as encouraging lawful conduct by the police. Although, as we have argued, the deterrent effect of the exclusionary rule is supported by experience and common sense and encourages the best in our police and magistrates, it does not stand on that basis alone. Reflecting on Orwell's warning on the direction our society may take in *1984*, we of the organized criminal defense bar are worried about our capacity to protect fairness and justice in the never-ending square-off against over zealous government prosecution. We implore this Court to hold the line on the Fourth Amendment.

Respectfully submitted,

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sions can perhaps be curtained by civil or criminal actions against the offending party, prevention of the less egregious violations must depend on exclusion of the evidence thus obtained. (Kamisar, *A Defense of the Exclusionary Rule*, 15 Crim. L.Bull. 5, 32-34 (1979).